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In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 649

ERNEST M. BULL, SOLE SURVIVING EXECUTOR AND Trustee of the Estate of Archibald H. Bull, Deceased, petitioner

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 87–89) is reported in 6 F. Supp. 141.

JURISDICTION

The judgment of the court below was entered March 5, 1934 (R. 89). A motion for a new trial was overruled October 15, 1934 (R. 90). The petition for a writ of certiorari was filed January 15,

1935 (R. 90). The jurisdiction of this Court is invoked under Section 3(b) of the Act of February 13, 1925.

QUESTION PRESENTED

The decedent was a member of a partnership. By the partnership agreement his estate was given the option of sharing in the profits and losses of the business for a year after his death, or of withdrawing. The question presented is whether a share in the profits earned by the business subsequent to the decedent's death and paid to his estate constitutes taxable income to the estate.

STATUTES INVOLVED

The applicable statutes are set forth in the Appendix, *infra*, pp. 9–10.

STATEMENT

The findings of fact of the Court of Claims (R. 83–86) may be summarized as follows:

The petitioner is the duly qualified and acting sole surviving executor and trustee of the estate of Archibald H. Bull, a citizen and resident of New Jersey, who died testate on February 13, 1920 (R. 83).

Until his death the decedent was a member of the partnership of A. H. Bull & Company, ship agents and brokers (R. 84). The partnership was created by written agreement of January 9, 1918, providing that the partnership was to begin January 1, 1918, and continue for one year from that

date (R. 84). After December 31, 1918, the partnership continued to operate from year to year by mutual consent of the partners without any further agreements (R. 84). The partnership agreement provided:

> that in the event of the death of any one of the said copartners, the surviving partner or partners shall be at liberty to continue said business, and the estate of the deceased partner shall receive the same interests, or participate in the losses to the same extent, as said deceased partner would, if living, based on the usual method of ascertaining what the said profits or losses would be for one year subsequent to the death of the said partner or partners. Or the estate of the deceased partner shall have the option of withdrawing his interest from the firm within thirty days after the probate of will or letters of administration, and all adjustments of profits or losses shall be made as the date of such withdrawal (R. 84).

The first method set out in the partnership agreement was followed by the surviving partners and the estate up to December 31, 1920 (R. 84). The intent and meaning of the agreement were that the surviving partner or partners and the estate of the deceased partner might permit the interest of the decedent to remain in the business to the end of the calendar year in which he died (R. 84).

The partnership was engaged in the ship brokerage business, for which no capital was required

and none was ever invested by the partners (R. 84). At the decedent's death, February 13, 1920, his share of the partnership profits in connection with business transacted from January 1, 1920, to his death, amounted to $24,124.20 (R. 84). The decedent had no other accumulated profits in the business and owned no other tangible property in connection therewith (R. 84). Thereafter the decedent's estate received $212,718.79 from the surviving partners, that amount being the portion of the profits of the business carried on by them from February 13 to December 31, 1920, which the decedent would have been entitled to receive for that period if he had lived (R. 84–85). Of the amount last named, $200,117.09 was received during the period mentioned, and $12,601.70 was received during the first two months of 1921 (R. 85). The decedent's estate received no further sums from the operation of the business subsequent to February 13, 1920, and all interest of the estate in the earnings and property of the business terminated at December 31, 1920 (R. 85).

In filing an estate-tax return, the decedent's executor included the decedent's interest in the partnership at a value of $24,124.20, which represented the decedent's share of the earnings accrued to the date of the decedent's death (R. 85). The Commissioner valued such interest at $235,202.99, arrived at by increasing the value by $212,718.79, the total thus representing the full amount received by the estate from the surviving partners (R. 85).

The estate tax on this increased amount was $41,517.45 (R. 85).

On April 14, 1921, the petitioner filed an income-tax return for the estate for the period from February 13, 1920, to December 31, 1920, which did not include the amount of $200,117.09 received during the period for which the return was filed as the share of the profits earned by the partnership (R. 85). The estate employed the cash receipts and disbursements method of accounting (R. 85.)

In July 1925 the Commissioner determined that the sum of $200,117.09 received in 1920 should have been returned by the executor as income to the estate for the period February 13 to December 31, 1920, and notified the petitioner of a deficiency in income tax due from the estate for that period, in the amount of $261,212.65, which was due, in part, to the inclusion of that amount as taxable income, and, in part, to adjustments not in controversy here (R. 85). No deduction was allowed by the Commissioner from the amount of $200,117.09 on account of the value of the decedent's interest in the partnership at his death (R. 85).

On September 5, 1925, the petitioner appealed to the United States Board of Tax Appeals from the deficiency asserted by the Commissioner (R. 85). The Board affirmed the action of the Commissioner in including the item of $200,117.09 in taxable income without any deduction on account of the value of the decedent's interest in the partnership at his death, and determined a deficiency of $55,166.49.

Bull v. *Commissioner*, 7 B. T. A. 993 (R. 85–86). The deficiency was paid with interest of $7,510.95 on April 14, 1928 (R. 86).

On July 11, 1928, the petitioner filed a claim for refund of $62,677.44 on the ground that the item of $200,117.09 was corpus and had been erroneously included as income to the estate (R. 86). The claim was rejected May 18, 1929 (R. 86).

The court below dismissed the petition (R. 89).

ARGUMENT

The petitioner contends that the amount taxed as income to the estate of the decedent represented the purchase price paid by the surviving partners for a capital asset, and was, therefore, not income to the estate. The court below, however, construed the partnership agreement as providing, not for such a purchase, but only for a method of continuing the business by which the estate of a deceased partner would receive the share of profits that the deceased would receive if living. We submit that, considering the nature of the business, the court below correctly interpreted the agreement. No principle for the construction of such an agreement was misconceived or misapplied, and we submit that the case does not merit review.

Since the partnership agreement, as properly interpreted, did not provide for a purchase of an asset in return for a share in the profits, cases in which the partnership agreement did so specifically provide are clearly distinguishable. *Pope* v.

Commissioner, 39 F. (2d) 420 (C. C. A. 1st); *Hill* v. *Commissioner*, 38 F. (2d) 165 (C. C. A. 1st), certiorari denied, 281 U. S. 761; *City Bank Farmers Trust Co.* v. *Commissioner*, 29 B. T. A. 190.

In the case at bar, the profits received by the estate would have been taxable to the decedent had he lived, and are income taxable to the estate, which stands in the decedent's place. The amount taxable is not limited to the excess over the amount included in the estate for the estate tax. *Waud* v. *United States*, 71 C. Cls. 567; cf. *Irwin* v. *Gavit*, 268 U. S. 161. If there was error in the computation of the estate tax, it is not material now. The present suit is concededly untimely in that respect. If error was made in the estate-tax return, that should furnish no occasion for a compensating error in the income-tax case.

Cases involving profits of a deceased partner accrued before his death, or the interest of a deceased partner in the profits from business not completed at his death, clearly do not control the present case. Cf. *Nichols* v. *United States*, 64 C. Cls. 241, certiorari denied, 277 U. S. 584; *United States* v. *Carter*, 19 F. (2d) 121 (C. C. A. 5th). Such amounts, we think, are taxable income to the decedent. *First Trust Co. of Omaha* v. *United States*, 76 C. Cls. 481; cf. *Darcy* v. *Commissioner*, 66 F. (2d) 581 (C. C. A. 2d), certiorari denied, 290 U. S. 705.

We submit that the petitioner may not claim exemption under Section 213(b)(3) of the Revenue

Act of 1918 (*infra*, p. 9) on the ground that the profits paid to the estate were acquired by bequest. Even if the estate could be considered as receiving the amounts by bequest as representative of the beneficiaries of the will, still, if the amounts constituted income rather than corpus, they would be taxable under the decision of this Court in *Irwin* v. *Gavit, supra.*

We submit that there is clearly no objectionable double taxation, for the estate tax and the income tax are levied upon different things and under different principles. *Waud* v. *United States, supra,* p. 570. Nor is there any attempt to subject one person to the payment of another's tax.

CONCLUSION

We submit that the decision below is correct. There appears to be no conflict of decisions. There is no question presented meriting review. The petition should therefore be denied.

Respectfully submitted.

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FEBRUARY 1935.

APPENDIX

REVENUE ACT OF 1918, C. 18, 40 STAT. 1057, 1065, 1070, 1071

SEC. 213. That for the purposes of this title (except as otherwise provided in section 233) the term "gross income"—

(a) Includes gains, profits, and income derived from salaries, wages, or compensation for personal service * * * of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transactions of any business carried on for gain or profit, or gains or profits and income derived from any source whatever.

(b) Does not include the following items, which shall be exempt from taxation under this title:

* * * * * *

(3) The value of property acquired by gift, bequest, devise, or descent (but the income from such property shall be included in gross income);

* * * * * *

SEC. 218. (a) That individuals carrying on business in partnership shall be liable for income tax only in their individual capacity. There shall be included in computing the net income of each partner his distributive share, whether distributed or

not, of the net income of the partnership for the taxable year.

* * * * *

SEC. 219. (a) That the tax imposed by sections 210 and 211 shall apply to the income of estates or of any kind of property held in trust, including—

(1) Income received by estates of deceased persons during the period of administration or settlement of the estate;

* * * * *

(b) The fiduciary shall be responsible for making the return of the income for the estate or trust for which he acts. The net income of the estate or trust shall be computed in the same manner and on the same basis as provided in section 212, * * *.

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